

**SKKPJ (TANAH MERAH) DEVELOPMENT SDN BHD v.
NORTH EAST PLANTATIONS SDN BHD**

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
AZIAH ALI JCA

[CIVIL APPEAL NO: T-02-3172-2009]
7 OCTOBER 2014

CONTRACT: *Frustration – Sale and purchase – Sale and purchase transaction conditional upon grant of consent to transfer – Application for consent from State Authority rejected – Whether non-fulfilment of condition precedent – Whether contract frustrated – Contracts Act 1950, s. 57*

CONTRACT: *Sale and purchase of land – Breach – Application for State consent within stipulated time – Whether time was of essence – Failure to object to delay – Whether amounted to waiver*

CONTRACT: *Damages – Sale and purchase of property – Whether damages should be awarded – Whether advantages or benefits derived from land should be restored – Contracts Act 1950, s. 66*

The appellant and the respondent entered into a sale and purchase agreement dated 25 November 2005 ('Principal Agreement') where the respondent agreed to sell to the appellant 22 lots of State land ('the lands') for RM10 million. The appellant paid RM500,000 as deposit. Out of the 22 lots, three lots were granted with qualified titles, while the remaining 19 lots were in dispute as the respondent's payment of premium for the 19 lots were rejected by the State Authority and the respondent had instituted legal proceedings against the State Government. Pursuant to the Principal Agreement, the sale and purchase transaction was conditional upon the grant of consent to transfer of the lands within six months from the date of the Principal Agreement, where the respondent was required to apply for State consent within 30 days from the date of the Principal Agreement. However, the application was only made on 5 February 2007. The appellant had full knowledge of the state of affairs at the material time. Together with the Principal Agreement, the respondent also signed a power of attorney ('POA') where the respondent agreed to grant powers to the appellant to execute and enforce all the provisions between the parties under the Principal Agreement. Three months after the execution of the Principal Agreement, the parties entered into a supplemental agreement ('SA') where it was agreed, *inter alia*, that upon payment of RM1.2 million by the appellant, the Principal Agreement would not be rescinded, the sale and purchase transaction shall continue regardless whether consent from the State Authority had been obtained and that the appellant shall pay the balance purchase price within six months from the date of the SA, failing which the SA would become null and void. The appellant failed to pay the balance purchase price despite

- A extensions of time having been granted pursuant to the SA. It was the appellant's case that it was not obliged to pay the balance purchase price until consent to transfer was obtained by the State Authority. On the contrary, the respondent contended that the appellant was aware of the delay in making the application for State consent and had not objected to it, therefore, the
- B appellant had waived the time period requirement under the Principal Agreement. Also, by virtue of the POA, the respondent argued that the obligation to apply for consent was on the appellant. The respondent further submitted that since its application for consent and its payment of premium for the 19 lots were rejected by the State Authority and the rejections were
- C further affirmed on appeal to the apex courts, the respondent was incapable of proceeding with the transaction. The High Court Judge ('HCJ') found that based on the decision of the State Authority which was upheld by the appellate courts, the Principal Agreement had become frustrated and s. 57 of the Contracts Act 1950 applied. The HCJ also agreed with the respondent that the obligation to apply for consent was on the appellant and that the
- D appellant had breached the SA by failing to make the payment according to the agreed terms. Aggrieved, the appellant appealed against the High Court's decision on the grounds, *inter alia*, that (i) there was no frustration of contract; (ii) the respondent had breached the Principal Agreement by delaying the application for consent; and (iii) the High Court ought not to
- E have awarded damages to the respondent.

Held (dismissing appeal with costs)

Per Aziah Ali JCA delivering the judgment of the court:

- F (1) The sale transaction between the parties was not an outright sale but a conditional sale to be completed when the respondent's application for consent to transfer had been approved by the State Authority. The parties had contemplated the risk of non-fulfilment of the condition precedent and had made provisions thereto in the Principal Agreement. In the circumstances, the Principal Agreement had not been frustrated and s. 57 of the Contracts Act 1950 did not apply. (paras 17-19)
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- H (2) From the correspondence between the parties after the expiry of the 30 day period within which the respondent should have made the application for consent to transfer, the appellant had waived the requirement of time. The conduct of the appellant in executing the SA approximately two months after the 30-day period had expired also supported the respondent's contention that time was no longer of the essence. When time for performance of the obligation by the respondent was allowed to pass and the parties went on to conduct themselves as though no breach had occurred then, by their conduct, time was no
- I longer the essence of the contract. (paras 20 & 21)
- (3) It was not disputed that the appellant had not paid the balance purchase price by the final extension date. Consequently, the SA became void and s. 66 of the CA would come into play. By virtue of s. 66, the appellant

was bound to restore to the respondent any advantage and/or benefit that it had derived from the titled lots. Since evidence was yet to be placed before the court with respect to the benefit received by the appellant from the titled lots, damages should be assessed by taking into account the benefits received from the lands and also the costs expended to improve the lands. (paras 24 & 25)

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Bahasa Malaysia Translation of Headnotes

Perayu dan responden telah memasuki satu perjanjian jual beli ('perjanjian jual beli') di mana responden telah bersetuju untuk menjual kepada perayu 22 lot tanah negerinya ('tanah tersebut') dengan harga RM10 juta. Perayu telah membayar deposit sebanyak RM500,000. Daripada 22 lot, tiga lot telah diberikan geran hakmilik sementara, manakala 19 lot lagi masih dalam pertikaian disebabkan premium yang dibayar oleh responden ditolak oleh Pihak Berkuasa Negeri dan responden telah memfailkan tindakan guaman terhadap Kerajaan Negeri. Berdasarkan perjanjian jual beli tersebut, urusan jual beli bergantung kepada pemenuhan syarat kebenaran pindahmilik diperoleh dalam masa enam bulan dari tarikh perjanjian jual beli di mana responden dikehendaki membuat permohonan untuk kebenaran pindahmilik dalam tempoh 30 hari dari tarikh perjanjian jual beli. Namun begitu, permohonan tersebut hanya dibuat pada 5 Februari 2007. Perayu mempunyai pengetahuan penuh tentang hal keadaan pada masa material. Bersama-sama dengan perjanjian jual beli, responden telah turut menandatangani suatu surat kuasa wakil ('SKW') di mana responden bersetuju untuk memberikan kuasa kepada perayu untuk melaksanakan dan menguatkuasakan semua peruntukan di antara pihak-pihak di bawah perjanjian jual beli tersebut. Tiga bulan selepas pelaksanaan perjanjian jual beli tersebut, pihak-pihak telah memasuki satu perjanjian tambahan ('PT') di mana pihak-pihak bersetuju, antara lain, bahawa selepas bayaran RM1.2 juta oleh perayu, perjanjian jual beli tersebut tidak akan dibatalkan dan urusan jual beli akan diteruskan tanpa mengambil kira sama ada kebenaran pindahmilik diluluskan oleh Pihak Berkuasa Negeri dan perayu harus membayar baki harga belian dalam masa enam bulan dari tarikh PT, jika gagal berbuat demikian, PT akan dianggap terbatal. Perayu telah gagal membayar baki harga belian meskipun tempoh lanjutan diberikan menurut PT. Adalah hujahan perayu bahawa perayu tidak bertanggungjawab untuk membayar baki harga belian sehingga kebenaran pindahmilik diperoleh daripada Pihak Berkuasa Negeri. Sebaliknya, responden berhujah bahawa perayu sedar akan penangguhan dalam permohonan kebenaran pindahmilik dan tidak menimbulkan sebarang bantahan, maka, perayu telah mengetepikan peruntukan faktor masa di bawah perjanjian jual beli tersebut. Juga, menurut SKW tersebut, responden menegaskan bahawa adalah merupakan kewajipan perayu untuk membuat permohonan kebenaran tersebut. Responden selanjutnya berhujah bahawa disebabkan permohonan kebenaran dan bayaran premium untuk 19 lot tersebut ditolak oleh Pihak Berkuasa Negeri dan penolakan tersebut disahkan oleh penghakiman

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- A mahkamah-mahkamah rayuan, responden tidak berupaya untuk meneruskan urusan tersebut. Hakim Mahkamah Tinggi ('HMT') mendapati bahawa berdasarkan keputusan pihak berkuasa negeri yang disahkan oleh penghakiman mahkamah-mahkamah rayuan, perjanjian jual beli tersebut telah dikecewakan dan s. 57 Akta Kontrak 1950 ('AK') telah terpakai. HMT
- B juga bersetuju dengan responden bahawa kewajipan untuk membuat permohonan kebenaran terletak pada perayu dan perayu telah melanggar perjanjian jual beli kerana gagal membuat bayaran mengikut syarat-syarat yang dipersetujui. Terkilan, perayu telah merayu terhadap keputusan Mahkamah Tinggi atas sebab, antara lain, bahawa (i) kontrak tidak
- C dikecewakan; (ii) responden telah melanggar perjanjian jual beli dengan menangguh permohonan untuk kebenaran tersebut; dan (iii) Mahkamah Tinggi tidak sepatutnya mengawardkan ganti rugi kepada responden.

Diputuskan (menolak rayuan dengan kos)

Aziah Ali HMR menyampaikan penghakiman mahkamah:

- D (1) Urusan jual beli antara pihak-pihak bukan satu jualan terus tetapi jualan bersyarat yang akan selesai apabila permohonan responden untuk kebenaran pindahmilik diluluskan oleh Pihak Berkuasa Negeri. Pihak-pihak telah mengambil kira risiko kemungkinan prasyarat tidak
- E dipenuhi dan membuat peruntukan sewajarnya dalam perjanjian jual beli tersebut. Justeru, perjanjian jual beli tidak dikecewakan dan s. 57 AK tidak terpakai.
- (2) Perbuatan perayu menandatangani perjanjian tambahan kira-kira dua bulan selepas tamat tempoh 30 hari tersebut menyokong hujahan responden bahawa masa bukan lagi asas kepada perjanjian antara pihak-pihak. Apabila masa untuk memenuhi sesuatu kewajipan oleh responden
- F telah dibenarkan berlalu begitu sahaja dan pihak-pihak terus berbuat seperti tiada keingkaran berlaku, maka melalui perbuatan tersebut, masa bukan lagi perkara asas bagi perjanjian antara mereka.
- G (3) Ia tidak dinafikan bahawa perayu masih belum membayar baki harga belian pada tarikh lanjutan akhir. Oleh sebab itu, perjanjian tambahan telah terbatal dan s. 66 Akta Kontrak 1950 telah terpakai. Melalui s. 66, perayu terikat untuk mengembalikan kepada responden sebarang kelebihan dan/atau manfaat yang diperoleh daripada tanah tersebut. Oleh kerana, keterangan berkaitan manfaat yang diperolehi oleh perayu
- H daripada tanah tersebut masih belum dihadapkan kepada mahkamah, ganti rugi harus ditaksirkan dengan mengambil kira manfaat yang diperoleh daripada tanah tersebut dan kos yang telah dibelanjakan untuk menambah baik tanah tersebut.

Case(s) referred to:

- I *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 3 CLJ 695 CA (refd)
Ocean Tramp Tankers Corporation v. V/O Sovfracht (The Eugenia) [1964] 1 All ER 161 CA (refd)

Wong Kup Sing v. Jeram Rubber Estates Ltd [1969] 1 LNS 201 HC (refd) A
Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA (refd)

Legislation referred to:

Contracts Act 1950, ss. 57, 66

For the appellant - Mahinder Singh Dulku; M/s Mahinder Singh Dulku & Co B
For the respondent - Mohd Salleh Abas (Abdul Haris Abdul Malik with him); M/s Abdul Haris & Co

[Appeal from High Court, Kuala Terengganu; Originating Summons No: 24-150-2008]

Reported by Lyana Shohaimay C

JUDGMENT

Aziah Ali JCA:

[1] The appellant (the defendant in the court below) and the respondent (the plaintiff in the court below) had entered into a sale and purchase agreement dated 25 November 2005 (“the Principal Agreement”) wherein the respondent as vendor, agreed to sell to the appellant the lands as described in the said Principal Agreement at the purchase price of RM10 million. The defendant had paid RM500,000 as deposit. D

[2] The respondent alleged that the appellant had failed to pay the balance purchase price and had sought, by way of the amended originating summons, for a declaration that the Principal Agreement dated 25 November 2005, the Supplementary Agreement dated 16 February 2006 and the power of attorney dated 25 November 2005 be declared invalid, cancelled and of no effect whatsoever and, that the respondent is entitled to manage the palm oil plantation in respect of the lands described in the Principal Agreement, the power of attorney and the Supplementary Agreement. The plaintiff also prayed for costs and damages to be assessed. E

The learned High Court Judge decided in favour of the respondent and allowed the reliefs prayed for. Hence this appeal. F

[3] We had heard the appeal and having considered the submissions made and the appeal records, we dismissed the appeal with costs for the reasons we give below. For ease of reference, parties will be referred to as they were in the court below. At the time of writing this judgment, a member of our panel, Clement Allan Skinner JCA, has since retired. G

Background Facts

[4] The State Authority had approved an area of approximately 9,821.63 acres of state land in the district of Dungun, Terengganu to the plaintiff (p. 188 appeal record). There were 22 lots in total (“the lands”). Out of the 22 lots, qualified titles had been issued to the plaintiff in respect of only three H I

A lots (“titled lots”). The State Authority had rejected the plaintiff’s payment of premiums in respect of 19 lots and the plaintiff had instituted legal proceedings against the State Government. As reflected in the Principal Agreement, the defendant had full knowledge of the state of affairs at the material time.

B [5] Clause 3.1 of the Principal Agreement provides that the sale and purchase transaction was conditional upon the grant of consent by the State Authority for the transfer of the titled lots by the plaintiff to the defendant within six months from the date of the Principal Agreement. Clause 3.2 provides that the plaintiff shall apply for such consent within 30 days from the date of the Principal Agreement. It is not disputed that the application for consent was made only on 5 February 2007 (p. 622 appeal record).

C [6] On the same date as the Principal Agreement, the plaintiff had also executed a power of attorney (p. 193 appeal record) wherein *vide* para. 2 the plaintiff agreed to give to the defendant power as follows:

D 2. Melaksanakan dan menguatkuasakan semua peruntukan di bawah Perjanjian Jual-Beli di antara Pemberi Kuasa dan Penerima Kuasa bertarikh 25hb November, 2005 (selepas ini dirujuk sebagai “Perjanjian tersebut”) dan semua perkara lain yang berhubung-kait dengannya di bawah Perjanjian tersebut itu.

E [7] Approximately three months after the execution of the Principal Agreement and at the request of the defendant, on 16 February 2006 the parties entered into a Supplemental Agreement (pp. 199-204 appeal record) wherein it was agreed *inter alia* that upon payment of RM1,200,000 by the defendant, the Principal Agreement shall not be rescinded and the sale and purchase transaction shall continue regardless of whether consent from the State Authority had been obtained, and the defendant was allowed to enter into the said lands and to continue to cultivate and develop the lands, and all proceeds from the cultivation and development of the lands shall be claimed by the defendant. It was common ground that possession of the lands had been given to the defendant.

F [8] It was further agreed *inter alia* that the defendant shall pay the balance purchase price within six months from the date of the Supplemental Agreement, failing which the Supplemental Agreement will be null and void and the defendant will vacate the lands immediately and there shall be no claim made against the plaintiff in respect of any payment made under the Principal Agreement.

G [9] The plaintiff alleged that the defendant had failed to pay the balance purchase price despite extensions of time having been granted to the defendant pursuant to the Supplemental Agreement. The defendant however contended that the Supplemental Agreement had become void and was no longer binding on the parties. It was the defendant’s case that the defendant was not obliged to pay the balance purchase price until consent to transfer

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was obtained from the State Authority, and since the plaintiff had failed to comply with cl. 3.2 of the Principal Agreement, the plaintiff had therefore breached the Principal Agreement.

[10] The plaintiff on the other hand contended that the defendant was aware of the delay to make the application for consent and had not objected to the delay. Hence the plaintiff says that the defendant had waived the time period as specified under cl. 3.2. Further, by virtue of para. 2 of the power of attorney, the plaintiff says that the obligation to apply for consent was on the defendant.

[11] It was the plaintiff's case that the transaction was conditional to the grant of consent and was also in expectation that the plaintiff would be given titles to the 19 lots. However on 18 July 2007 the State Authority had rejected the plaintiff's application for consent to transfer the titled lots (p. 255 appeal record) and the State Authority had also rejected the payment of premiums for the 19 lots. Thus the 19 lots remained as state land. The High Court had dismissed the plaintiff's challenge of the decision by the State Authority and the decision was subsequently affirmed by the Court of Appeal and the Federal Court. Therefore the plaintiff says that it was incapable of proceeding with the transaction.

The Decision Of The High Court

[12] The learned judge found that based on the decision of the State Authority which had been upheld by the courts, the Principal Agreement had become frustrated and s. 57 of the Contracts Act 1950 applied.

[13] The learned judge agreed with the plaintiff that, based on para. 2 of the power of attorney, the obligation to apply for consent was on the defendant. Referring to the Supplemental Agreement, His Lordship found that the defendant had failed to make payment in accordance with the terms agreed. Therefore the defendant was found to be in breach of the Supplemental Agreement.

The Appeal

[14] The gist of the submissions by the learned counsel for the defendant, Dato' Mahinder Singh Dulku can be summarised as follows:

- (a) There was no frustration of contract;
- (b) Even if the Principal Agreement had been frustrated, such frustration was self-induced by the plaintiff;
- (c) That time was the essence of the contract and the plaintiff had breached cl. 3.2 of the Principal Agreement;
- (d) That the High Court ought not to have awarded damages to the plaintiff;
- (e) That the High Court ought to have converted the originating summons into a writ action.

A *Whether The Principal Agreement Had Been Frustrated*

[15] Section 57 of the Contracts Act 1950 provides that an agreement to do an act of impossibility is void and a contract to do an act which, after it is made, becomes impossible or unlawful and it was not induced by the promisor, becomes void when the act becomes impossible or unlawful.

B Section 57 states as follows:

Agreement to do impossible act

57. (1) An agreement to do an act impossible in itself is void

Contract to do act afterwards becoming impossible or unlawful

C (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

D Compensation for loss through non-performance of act known to be impossible or unlawful

(3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.

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[16] The ambit of s. 57 was explained by Gopal Sri Ram JCA (as he then was) in the case of *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 3 CLJ 695. In his judgment His Lordship referred to the case of *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666, wherein the court applied the *dictum* of Lord Denning MR in *Ocean Tramp Tankers Corporation v. V/O Sovfracht (The Eugenia)* [1964] 1 All ER 161 (CA). Having referred to the authorities, Gopal Sri Ram said as follows:

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[7] It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s. 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s. 57 does not bite.

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[17] Reverting to the present appeal, the defendant was aware that the plaintiff had title to only three lots, for which consent from the State Authority to transfer was required. The sale transaction between the parties was not an outright sale, but a conditional sale, to be completed when the plaintiff's application has been approved by the State Authority.

[18] In respect of the issue of consent to transfer, we find that the parties had contemplated the risk of non-fulfilment of the condition precedent and therefore had made provisions for such risk. Clause 3.4 provides that the Principal Agreement shall be deemed to be rescinded in the event that the condition precedent in cl. 3.1 was not fulfilled and/or, upon the occurrence of any of the events described in cl. 3.3. Clause 2.2 provides that the deposit shall not be refunded by the plaintiff in the event that the Principal Agreement was rescinded due to non-fulfilment of the condition precedent specified in cl. 3.1 or due to the plaintiff's default. Clause 12.1 provides amongst others, the remedy of specific performance or damages *in lieu* thereof to the defendant where the plaintiff has committed an act of default.

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[19] In the circumstances, we agree with the learned counsel for the plaintiff that the Principal Agreement had not been frustrated and s. 57 does not apply. We are of the view that there was no frustration of the Principal Agreement and for this reason the question of self-induced frustration does not arise.

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Whether The Plaintiff Had Breached cl. 3.2 Of The Principal Agreement

[20] Learned counsel for the defendant submitted that time was the essence of the contract and the plaintiff had breached the Principal Agreement by the delay in making the application for consent. We have considered the correspondences exchanged between the parties after the expiry of the 30 days period specified in cl. 3.2 and we find that the correspondences show that the defendant had waived the requirement of time. Further, the conduct of the defendant in executing the Supplemental Agreement approximately two months after the 30 days period had expired supports the plaintiff's contention that time was no longer the essence to the contract between the parties.

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[21] When time for performance of the obligation by the plaintiff under cl. 3.2(a) was allowed to pass, and the parties went on to conduct themselves as though no breach of the Principal Agreement had occurred then, by their conduct, time was no longer the essence of the contract (see *Wong Kup Sing v. Jeram Rubber Estates Ltd* [1969] 1 LNS 201).

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Whether Damages Are Payable To The Plaintiff

[22] Learned counsel for the plaintiff submitted that since the defendant had taken possession of the plaintiff's land, damages were therefore payable to the plaintiff.

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[23] Clause 6 of the Principal Agreement states that the defendant would be entitled to possession of the lands upon payment of the balance purchase price. However by cl. 1.1.1 of the Supplemental Agreement, the parties agreed to continue with the sale and purchase transaction regardless of whether consent from the State Authority had been obtained or otherwise.

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A The defendant agreed to pay the balance purchase price within six months from the date of the Supplemental Agreement, failing which the Supplemental Agreement shall become null and void and the defendant shall vacate the lands and shall make no claim whatsoever with regard to payments made to the plaintiff under the Principal Agreement.

B [24] It is not disputed that the defendant had not paid the balance purchase price by 30 December 2006, the final extension date. Consequent to this, the Supplemental Agreement became void. Since the agreement had become void, s. 66 of the Contracts Act 1950 would come into play.

C [25] Section 66 provides *inter alia* that when a contract becomes void, any person who has received any advantage under the contract is bound to restore it to the person from whom he received it. The defendant had been in possession of the titled lots and would have received an advantage and benefited from such possession. By virtue of s. 66, the defendant is bound to restore to the plaintiff any advantage and/or benefit that it had derived from the titled lots. However evidence had yet to be placed before the court with respect to the benefit received by the defendant from the titled lots. In the circumstances, we agree with the learned judge that damages should be assessed by taking into account the benefits received from the said lands and also the costs expended to improve the lands.

E *Whether The Originating Summons Ought To Be Converted Into A Writ Action*

F [26] Learned counsel submitted that the learned judge ought to have converted the originating summons into a writ action. However, as pointed out by learned counsel for the plaintiff in his written submissions, no such application was made to the learned judge. Rather it was a suggestion made by learned counsel for the defendant during submissions.

G [27] We agree with learned counsel for the plaintiff that the facts in this case are not in dispute. The issues for determination by the High Court revolved on points of law which could be determined by reference to the documents placed before the court. Therefore there is no merit in the submissions made by the learned counsel for the defendant.

[28] For the reasons aforementioned, we dismissed the appeal with costs. We ordered damages to be assessed by the High Court.

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